UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SONY MUSIC ENTERTAINMENT, et al.,	:	Civil Action No. 1:18-cv-0950
Plaintiffs,	:	
v.	:	March 18, 2022 10:15 a.m.
COX COMMUNICATIONS, INC., et al.,	:	
Defendants.	:	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE

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MORNING SESSION, MARCH 18, 2022

(10:15 a.m.)

THE COURTROOM CLERK: The Court calls *Sony Music Entertainment, et al. versus Cox Communications, Inc., et al.*, Case Number 1:18-cv-950.

May I have appearances, please, first for the plaintiff.

MR. ZEBRAK: Good morning, Your Honor. Scott Zebrak for the plaintiffs. With me are my colleagues, Matthew Oppenheim and Jeffrey Gould.

THE COURT: All right. Good morning. Good morning to each of you.

MR. McGAUGHEY: Good morning, Your Honor. Tyler McGaughey on behalf of the defendants, Cox Communications and Cox Comm.

I have with me at Counsel's table my colleague, Michael Elkin. He's going to be handling the motion today, and he's going to introduce himself and the rest of the team.

THE COURT: All right. Thank you, Mr. McGaughey.

Good morning, Mr. Elkin.

MR. ELKIN: Good morning, Your Honor. The other appearances from our side are Jennifer Golinveaux and Sean Anderson from Winston & Strawn, counsel for the defendants, together with a representative of Cox, Nicole Warrior.

THE COURT: All right. Good morning to each of you. All right. This comes on a motion by Cox for relief from judgment, and I've read the pleadings, and I've looked at the pleadings in

the Colorado action, and I appreciate your coming in this morning. I really wanted to, you know, hear any further thoughts that you had. I mean, you really got down in the weeds in the pleadings and specifically about the source code that was developed in the -- information of it was developed in the *Charter* case and that MarkMonitor utilized, but I really brought you here this morning just to ask you to focus on what you think the important points are and any new thoughts that you've had since the pleadings were generated.

So, Mr. Elkin, I'll hear from you first, sir. And I don't need to separate out these two sets of motions. I think they all dovetail.

MR. ELKIN: I understand. Your Honor, first, it's a pleasure to be back in your courtroom, and we appreciate your holding the hearing.

THE COURT: All right. Certainly.

MR. ELKIN: I'm going to focus on the key issues, but I just want to set the stage for a minute or two before I do that. Your Honor, plaintiffs misled the Court and misled the jury, and they misled opposing counsel as to the providence of key evidence in the case. Specifically, the audio files that plaintiffs falsely claimed were downloaded from the Internet prior to sending Cox the infringing notices -- the infringement notices, and they did so because they wanted to plug material gaps in their linear presentation of direct infringement proofs. They

did so as they wanted to avoid being cited for recreating evidence after the fact. They did so to cover their tracks. They did so to overcome obvious foundational issues that may well have resulted in the evidence not coming in. They did so to prevent opposing counsel from being able to successfully introduce material-impeaching evidence, and they did so to prevent opposing counsel from attacking the weight of their evidence in a more effective manner. And they did all of this in a carefully orchestrated manner by carefully wordsmithing their pleadings, by inducing nuanced testimony from fact and expert witnesses, and by their slight-of-hand maneuvering in court arguments.

And Your Honor, one of the things I want to talk about this morning, if I'm permitted, is to address why it all mattered.

The Court did not have in front of it the truth, and the defendants did not have the ability to address the deficiencies in plaintiffs' proofs.

And if there's any doubt about this, and I realize Your Honor already mentioned that you've examined the record in *Charter*, what's happened in the *Charter* case is that the plaintiffs have had to embark on an entirely different strategy in presenting the proofs because all of this has come out, and the Court has recently specifically permitted the defendant there to attack the holes in plaintiffs lineal aggression of evidence.

To be clear, we do not treat this, our Rule 60 obligations to the Court lightly. We don't do that. We understand the magnitude of the relief that we're seeking. And it's for that reason we assembled the robust record that's before the Court. That's why it was as significant as it was.

Before going through the record as to the key elements, I just want to preview very quickly for the Court the -- those points, and we have a couple of demonstratives on the screen just to help coincide with the presentation.

With the Court's permission, I would like to address these points this morning: How plaintiffs sought to prove direct infringement, what plaintiffs used to prove direct infringement, how plaintiffs misrepresented the MarkMonitor evidence to prove infringement, why did plaintiffs misrepresent the evidence, why these misrepresentations are material. And finally, why relief is appropriate.

I'm going to be focusing, Your Honor, just on the first Rule 60 motion. I'm happy to address questions with respect to the second as to the source code, and I'll mention it very briefly at the end if I'm permitted.

THE COURT: All right. Go ahead.

MR. ELKIN: Turning to the next slide, as Your Honor was aware, plaintiffs asserted in this case two secondary infringement claims, the contributory infringement and the vicarious infringement claims. And they each share a unitary

element, the notion that they had to establish direct infringement. So this -- this element, this direct infringement, a lot was devoted to the actual discovery in the case. And after the Court denied plaintiffs' motion for summary judgment as to the direct evidence, it became a focal point at the trial, together with other issues, but it consumed a lot of the trial days, as Your Honor may remember.

And, of course, a lot of these cases regarding ISPs and secondary copyright infringement involved circumstantial evidence. You don't have screenshots showing people what they're doing as they're doing it, but plaintiffs in this particular case didn't have the contemporaneous capture proof of the contents being infringed like Your Honor observed in the *Sony BMG* case. Rather, the plaintiffs relied on linking together several pieces of circumstantial evidence to prove this foundational element. And central to all of this as Your Honor, I'm sure, remembers, was the evidence sourced by the plaintiffs' vendor, MarkMonitor.

So, several pieces that are critical to our motion, that were critical to the trial, were the specific pieces of MarkMonitor evidence at issue that plaintiffs used to tell this narrative. First, the MarkMonitor spreadsheet itself was represented to be the verification of the audio files allegedly infringed by Cox's subscribers, and Your Honor admitted this spreadsheet as PX11. It was referred to a lot in discovery and motions in limine, as I think the 431 spreadsheet.

Second piece were the copies of the infringing files on the MarkMonitor spreadsheet which were produced on a hard drive which Your Honor admitted as PX39.

So how do they present these -- their direct infringement evidence using these core areas? They told a linear narrative and they told us in the beginning. They told it in discovery, they told it in their experts, they presented this at trial. The linear narrative is that they methodically, one, downloaded the allegedly infringing peer-to-peer files; two, verified that those files contained the copyrighted content through the Audible Magic verification process; three, generated a list of allegedly verified peer-to-peer files; four, sent notices based on the peer-to-peer users sharing those verified files, and finally, tied these notices to Cox subscribers audifying that Cox could be secondarily liable for those acts. But the reality behind this linear, methodical progression of evidence is much different, and I want to take the Court through that right now.

Plaintiffs actually did not have the underlying infringing files on which they based verifications and notices. They didn't come to court with those. And plaintiffs did not have the underlying verification data of the later obtained files that they actually put into evidence, they only had the MarkMonitor spreadsheet which wasn't tied to any of the files in evidence. Through concerted efforts, the plaintiffs were able to fill these gaps with evidence that they had generated after they had sent

notices to Cox, a fact that is not part of and doesn't fit into the narrative that they told at trial.

And we have specifically laid out, and I'm confident that Your Honor has reviewed the brief, page 17, where we talk about the eight acts of misconduct, but they all sort of are rooted in two core issues. First, plaintiffs, we submit, misrepresented the MarkMonitor spreadsheet. They represented that the MarkMonitor spreadsheet contained verifications of the files in evidence, when, in fact, the verifications were of files that plaintiffs now admit MarkMonitor failed to retain. And they misrepresented the hard drive, that the hard drive contained the files that were verified before the notices were sent, those that were contained on the MarkMonitor spreadsheet.

In doing so, they failed to disclose that they were actually downloaded in 2016, years after the notices were sent. And the specific misrepresentations that Cox demonstrates are as follows -- and I'll walk the Court very briefly through them in a moment.

They withheld the 2016 Statement of Work and project despite Judge Anderson's order. They withheld and didn't log the PCAP files, which I'll explain the significance of in a second, that would have confirmed the 2016 origins of the files on the hard drive and otherwise concealed their existence. They withheld and did not log the Hash Report summarizing MarkMonitor's record of Audible Magic's 2016 attempts to

authenticate and verify those files and otherwise concealed this existence. They allowed Audible Magic and MarkMonitor to destroy evidence of these attempts despite having these attempts being generated in anticipation of litigation. They concealed the 2016 project to the Court when they elicited a sworn statement for MarkMonitor's percipient witness, Sam Bahun, B-A-H-U-N, that quote, "The RIAA MarkMonitor did not enter into a separate SOW concerning the litigation program," closed quote. They again concealed the 2016 project when they represented to the Court that there was no effort to validate the data in the MarkMonitor spreadsheet after the claims period in anticipation of trial. They caused two of their trial witnesses, Ms. Frederiksen-Cross their technology expert, and Sam Bahun to give testimony that mischaracterized the hard drive's contents. And finally, they submitted a declaration and made arguments prior to trial to the same effect.

Just very specifically on each of these points, as it related to Judge Anderson's hearing and the order that he issued on January 25th, 2019. Plaintiffs did not produce the 2016 Statement of Work, despite Judge Anderson's order that they produce all of their contractual obligations with MarkMonitor.

Judge Anderson explained in his order, encompassed the following -- this is right in the transcript that Your Honor has part of the record. Quote, "If plaintiffs signed a contract with MarkMonitor, if you had a written agreement, if you have an

understanding, a letter agreement that says you're going to do this, we'll pay you for this, you provide me with these services, these are your obligations, these are my obligations, that kind of an agreement or description of the relationship between MarkMonitor and plaintiffs' clients," closed quote.

Plaintiffs now take the position that Judge Anderson's order was limited to the notice program that put Cox on notice of the alleged infringements but the record doesn't reflect that. There is nothing in Cox's underlying request, the parties' dispute over that request, Judge Anderson's order that supports plaintiffs' post-hoc argument in an attempt to demonstrate the completeness of their proposed production, plaintiffs represented at the hearing to Judge Anderson that they would be producing, and I'm quoting from the record, "the evidence that MarkMonitor has captured for purposes of the case which included all the music." That's what they said, known to plaintiffs at the time, Your Honor, but not to us, not to Cox. The files with all of the music were those downloaded pursuant to the 2016 project. There was no basis for plaintiffs to withhold the very agreement that gave rise to that evidence.

Secondly, plaintiffs heavily lean on their counsels' clarification regarding the program at issue in the case, but it's very clear reading the transcript what they were referring to in the hearing with Judge Anderson, was this notion that MarkMonitor and the RIAA had entered into unrelated programs

related to universities or projects that concerned trademarks.

Third, plaintiffs expressly agreed and Judge Anderson expressly ordered that plaintiffs produce information beyond the 2012 and 2014 range regarding MarkMonitor's reliability or issues plus the agreement and relationship. Judge Anderson could not have been more clear that the timeframe related to other discovery did not extend to agreements with MarkMonitor.

The plaintiffs claim that the 2016 project was not an audit or an investigation as to the reliability of the MarkMonitor system, as it only pertained to downloading certain files in anticipation of litigation, but they ignore that the 2016 Statement of Work not only required MarkMonitor to attempt to re-download files purportedly that were referenced in the spreadsheet, it also required MarkMonitor and Audible Magic to reverify those downloads.

And if you take a look at the excerpts from the Statement of Work, it -- it -- it's right there. They successf- -- "To successfully download files with those hashes will be processed against Audible Magic fingerprinting for identification and verification."

We submit, Your Honor, that plaintiffs' act of downloading and verifying the files in 2016 plainly calls into question the notion that plaintiffs did not try to go back or verify the Audible Magic fingerprints, or at least some evidence -- at least some evidence of an audit and accordingly responsive to Cox's

discovery request.

THE COURT: Well, they had the hashtag, so they had the same numbers consistently throughout, right?

MR. ELKIN: Right. The hashtags, for purposes of this argument -- and I know this was an issue that we discussed at some length at the trial. I do remember. The hashtags, we're not just talking about right now the fallibility or infallibility of the hash-matching process, but what's at issue in the case in every copyright case, as Your Honor knows, is: Are the works that -- are the works that are being sued on, are those the works that were copied? And so the hash numbering has to actually reflect the recordings that the -- or music compositions that the plaintiffs are being put into the case.

In this particular instance, what you had was as follows: You have the MarkMonitor spreadsheet, the 431 spreadsheet which has hashes, and it is -- you know, it cross-referenced hashes that allegedly were -- were verified, but the files that were verified were not the files that existed relative to the verification itself. Those files were destroyed. There's no question about that, and we did not know that. The files, and Your Honor admitted the spreadsheet in relationship to the actual audio files themselves that were contained in the hard drive that had those hash numbers and those -- those particular recordings themselves, they were not verified by the spreadsheet that Your Honor admitted into evidence. They were purportedly verified in

a way -- by documents that have been destroyed. So you had two mismatched halves.

THE COURT: All right.

MR. ELKIN: So while you do have numbers that one could compare it to, we don't know specifically what those numbers reflect. We'd have to take their word as to what it is, and that's not how they presented their case, Your Honor. It's not the case that they presented to us. It's not the case they presented to the jury. It was not the case they presented to Your Honor. It was a different case.

THE COURT: Tell me. There was -- when you use the word "verification," there were different verifications, and I recall testimony about a witness having actually listened to some of the music to make sure that the hashtag and that the file reflected the actual music of the entertainer, and I didn't go back and actually read that trial testimony, but there was some verification by that means as well sporadically through the -- and, of course, in their -- you know, we started with 12,000 or however many other and then ultimately arrived at 10,017 or whatever, but that was obviously a moving target for a significant length of time. But as to actually -- Sony witnesses listening, how does that fit into your argument?

MR. ELKIN: Well, it -- it -- it's -- it -- it's largely not relevant at all for reasons I'll get to in a moment. Your Honor actually admitted the hard drive. There was a statement at

sidebar by opposing counsel that represented to Your Honor that all of the files on the hard drive went through digital listening. Digital listening was referenced, obviously, by the Audible Magic fingerprinting process. That was a misstatement, a misrepresentation that was specifically made to Your Honor to get the hard drive files into evidence. That was -- the representation that a Sony witness here and a UMJ witness there, and a Warner witness somewhere else listened to some files, I can't sit here and say that was done purely for theatrics. I don't know what their purpose was, but that wasn't the basis upon which they laid a foundation for the admission of those audio files.

So, yes, there was testimony by certain of their representatives, to be clear, that they listened to them. One witness said, "I listened to a hundred," some, "I listened to a few," but that wasn't -- it's not the equivalent of digital listening in the *Charter* case, what they were able -- what they did once all of this came out. They hired eight different listeners and they hired some professor at NYU to study wavelength, and, to be clear, we won't get into the specifics of that case, but there were significant challenges, you know, with regard to that process, and -- and -- and in that case they're seeking now to reverify files for the third time. But, no, the -- there -- there was testimony to that effect, but it was not the basis on which they sponsored the hard drive of audio

files.

THE COURT: Thank you. Go ahead.

MR. ELKIN: Thank you. So just sort of continuing. Their production of the 2016 Statement of Work does not somehow absolve MarkMonitor -- there's a statement in their papers that MarkMonitor actually produced the Statement of Work, and that's true, and we looked at it, and we couldn't make heads or tails of it because there was nothing on the face of tha- -- of that document that suggested that it was anything other than forward looking. It didn't suggest -- it wasn't contextualized. It didn't state that it was done for purposes of recreating evidence.

And so, yes, we didn't ask a question about it because we didn't understand it. There was nothing on the face of it that reflected that it had anything to do with this case, and it wasn't produced by the plaintiffs. They were required by Judge Anderson to produce all agreements, and they didn't do it.

But just turning now to the Hash Report and the PCAPs and the disclosure of the disruption of the Audible Magic verifications, plaintiffs also failed to produce the other fruits of the 2016 project. And I refer to fruits, Your Honor, because they produced the audio files that came in, but they didn't produce the correlative PCAPs in the Hash Report which was fundamentally part of the same project.

They didn't disclose that the 2016 Audible Magic

verifications were not retained. The PCAPs, which I understand stands for Packet Captures, are files that would confirm when and where each of the audio files on the drive was downloaded. So Your Honor probably remembers the testimony at trial, but when were these files downloaded? Had they produced the PCAPs, we would have known that. They didn't produce them. The Hash Report, Cox understands from an order issued by Judge Jackson, a district court judge in the *Charter* case, that the Hash Report is a document -- this is pursuant to his public order, quote, "that indicates which of the files had previously been the subject of notices could no longer be identified or verified," closed quote. That's ECF in the *Charter* case 436 at 5.

This information clearly bears on the 2016 hard drive files, and the accuracy of plaintiffs' processing for verifying files before sending notices.

I'm reminded, there was also a document that we weren't able to get in -- there was a motion in limine that we argued for at least an hour before trial -- related to a competing spreadsheet that we wanted to get into evidence -- we called it the 236 Spreadsheet -- before trial in order to highlight the problematic origins of the foundation of the MarkMonitor spreadsheet, including that it lacked any of the underlying Audible Magic verification data. So we sought to introduce a version of that document that had been produced by Audible Magic which was compiled after the claims period and contained some of

the Audible Magic transaction data that plaintiffs and MarkMonitor failed to retain.

We thought that was important. We had our expert, Dr. Feamster, opine on that. He couldn't opine at the trial because that was struck, but Cox argued that this post-claims period showed that a substantial percentage -- that our position that we argued to Your Honor at the time showed that a substantial percentage of the files allegedly comprising the infringed works were, in fact, determined by Audible Magic not to be verified. You can see that is why we wanted to get that in.

At the hearing on motions -- plaintiffs' motions to preclude the admission of the document, Your Honor sought plaintiffs' assurance whether, quote, "there is any evidence in the case that the purpose for compiling this post-claims period data was to go back and look at the accuracy of the MarkMonitor document for information," closed quote. That is Cox Exhibit 12. This is the November 12, 2019 hearing before Your Honor, page 5, lines 18 to 21; page 6, lines 1 to 8.

Plaintiffs' counsel represented to Your Honor that, quote, "There is no indication that that's the case at all," closed quote. That's at page 6, lines 9 and 10. And Your Honor thereafter sustained plaintiffs' objection.

Cox admits that the 2016 project was exactly that, an effort after the claims period to re-download and reverify files reflected on the MarkMonitor spreadsheet, and if the data on the

MarkMonitor spreadsheet was sufficient and did not need to be checked, there would have been no reason to have done that.

Moreover, plaintiffs did not inform the Court at the time that there, in fact, had been an effort after the fact to reverify the files. That was never mentioned to Your Honor.

Prior to trial -- this has to do with the hard drive prior to trial. Prior to trial, we tried to -- we challenged the hard drive's foundation because it was being offered to support notices sent between the 2012 and 2014 timeframe, though its metadata, Your Honor may remember, said that it was created in 2016. So we're trying to figure that out.

Plaintiffs submitted a declaration from Sam Bahun from MarkMonitor, in which he described the hard drive files as containing, quote, "audio files that were the subject of Audible Magic identifications and as copies of the actual audio files," closed quote, used for this purpose.

Given the extensive representations that plaintiffs made as to how they were going to prove infringement, this sworn statement, we submit, can only be read to mean that the audio files on the hard drive were the ones captured before the claims period. And, of course, plaintiffs studiously avoided stating when the files were first downloaded.

We submit, our position, is that this submission, Your Honor, was highly misleading because plaintiffs had concealed the entire 2016 project, the Statement of Work, the PCAPs, the Hash

Report. The only Audible Magic identifications disclosed at the time were those performed prior to notices being sent between 2012 and 2014 and documented on the MarkMonitor spreadsheet. The only reasonable inference for MarkMonitor's sworn statement was that the audio files were the files verified in that period, and let's talk about what happened at trial.

Plaintiffs admitted the hard drive at trial based on testimony from Bahun, that it contained copies of all of the music files related to the recordings on the MarkMonitor spreadsheet. And this testimony is set forth in Exhibit 7 to our moving Rule 60 motion, it's the trial transcript, page 643, lines 3 to 12.

On cross-examination, Cox asked Bahun, when were those songs put on the hard drive. Bahun testified consistent with the hard drive metadata that he thought it was created at the end of 2015, beginning of 2016, around that timeframe.

Cox then moved to strike the exhibit on the basis that it was made two years after the downloading of the files. Your Honor denied the motion holding that just the timing of when the drive was created doesn't make it any more or less reliable. But at the Court's invitation to probe further, Cox inquired at that time when the files of the hard drive -- where it came from and how they were put on the hard drive. Bahun respond to Mr. Brody's questions that the files were on one of the MarkMonitor systems where it would have been stored -- where it would have

stored them.

Cox followed up and asked, when the files were stored on your system, to which Bahun responded that they were stored on different dates and agree that some of them were stored on MarkMonitor's system when they were first downloaded from the Internet, first downloaded from the Internet.

And as for the others, he explained that he wasn't sure when, but some of them were downloaded multiple times throughout the course of time that we're talking about here. That is during or before the 2012, the 2014 time period when the notices were sent.

We submit, Your Honor, that this testimony was false. Plaintiffs knew they were false. Counsel knew they were false because Mr. Bahun and plaintiffs' counsel knew that all of this was done in January of 2016. There's no other way that he could have answered that question. They knew that the earlier files were not retained. There could not have been any confusion, as it was plaintiffs' outside counsel who hired Bahun to do this, and it was plaintiffs' counsel and Bahun that worked on this project.

Trying to avoid what was clearly false testimony, plaintiffs argue now that Bahun actually offered testimony that Cox states was withheld, but plaintiffs are wrong. The reference in the trial transcript, many pages earlier and the day earlier on the direct testimony, merely describes -- Bahun was merely

describing the composition of the MarkMonitor hard drive and, specifically, why it didn't include files from the Gnutella peer-to-peer network. The only time the question at issue was -- was raised and Mr. Bahun answered it was on cross-examination.

Why did they do all of this? Why did they misrepresent the MarkMonitor evidence? Why did they go out of their way to do this if the hash versus the hash is golden? Then why would they go out of their way to do this?

When plaintiffs decided to file this lawsuit, Your Honor, in 2016, they realized they had a few problems. Number one, MarkMonitor had not retained copies of the files for which they had sent notices. They didn't do it.

. Secondly, the MarkMonitor spreadsheet that Your Honor admitted, a document that they claimed represented that the files identified in the notices contained the copyrighted works, did not include any evidence of the underlying Audible Magic verification-related files that plaintiffs would put into evidence.

And while it was too late for plaintiffs to download from -- the files from Cox the way that the plaintiffs did, had Rightscorp do for BMG, they recognized that they needed to fill in the evidentiary gaps to avoid unfavorable discovery, rulings, and potentially a verdict. And why does it matter? Why does any of this matter?

We submit, Your Honor, that these misrepresentations were

material because they prevented Cox from adequately attacking this direct infringement evidence. It led to the admission of evidence elemental to their direct infringement case, the hard drive, and the MarkMonitor spreadsheet, and, frankly, it provided a false narrative to the Court and the jury in the case against Cox.

Related to this preclusion of the alternate version of the spreadsheet that we tried to get in, the Court sustained plaintiffs' objection to Cox's proffered admission of the alternate version of the MarkMonitor spreadsheet that contained data raising issues about the mark reli- -- the reliability of the MarkMonitor system, and we don't know whether Your Honor still would have precluded it. I suspect that Your Honor may not know at this stage how you would have ruled. We don't know. But if the Court had known that the MarkMonitor spreadsheet that was admitted did not represent verification of files on the hard drive, were versions that they failed to retain, and that plaintiffs had indeed re-downloaded and reverified those files after the claims period but those verifications had also been destroyed, it may -- the Court may have overruled the objection and allowed the admission of the evidence. We don't know.

As to the admission of the hard drive and the MarkMonitor spreadsheet, there is no question, in our view, that the hard drive and MarkMonitor spreadsheet were essential to plaintiffs' direct evidence case. Their data expert, Professor McCabe, who

provided the basis for plaintiffs to argue that all of the works in suit had been infringed, Professor McCabe testified that unless a file allegedly comprising a work in suit was located on the hard drive, it could not meet one of its four requirements needed to verify the infringement.

And their technical expert, Barbara Frederiksen-Cross, pointed to the hard drive over and over and over again in her testimony when opining as to the reliability of the MarkMonitor and Audible Magic systems. I don't blame her. I don't think that she knew, but we don't know what -- what the interactions were.

At trial, Cox sought on numerous occasions to preclude the admission of the hard drive, as Your Honor may remember -- they were relentless -- on the basis that its 2016 metadata undermined its foundation, and there was no evidence that anyone had comprehensively listened to the files.

In response to one such objection, plaintiffs' counsel represented at sidebar, and I referred to this earlier, quote, that "every one of the files went through Audible Magic which did essentially the equivalent of digital listening," closed quote, and that is contained, Your Honor, in Exhibit 7 to our moving brief, trial transcript page 647, lines 16 to 21.

As a result of that exchange, that colloquy, Your Honor ultimately was able to -- admitted that hard drive in. But of course the representation told to Your Honor was only a half

truth. While the files of the hard drive did go through Audible Magic, those verifications were destroyed. Counsel did not disclose that to Your Honor, and the verifications contained on the MarkMonitor spreadsheet, the evidence to which counsel pointed for the purporting digital listening were for files that were also destroyed. Counsel also did not inform Your Honor about that.

And by the way, if plaintiffs had disclosed the truth, their trial narrative would have been quite different. For this reason, their primary argument in opposition that the download date of a particular copy of the file doesn't change, that the copies of files with the same hash values are identical -- that was their argument in response to our Rule 60 motion -- we submit rings hollow.

As I mentioned, they're presenting a different case in *Charter*, so they've appeared to have abandoned the MarkMonitor spreadsheets and it's purported verifications, a centerpiece of their trial evidence here. They have also undermined their acclaimed interchangeability of the files and verifications, a position both contrary to their trial strategy here and in opposition to our motion, and we submit that development alone demonstrates that Cox was unable to fully address this. Let me just spend a moment on why the relief is warranted, and then I'll sit down, unless the Court has any further questions.

We think that the plaintiffs, Your Honor, should be

required to accurately present -- they should have been required to accurately present their evidence to the jury. Plaintiffs would be required to proceed -- should have been required to proceed on a case that would have issued a showing, a real showing, and that real showing would have included the following: That they failed to retain the original files downloaded by MarkMonitor and verified by Audible Magic, that the MarkMonitor spreadsheet does not contain verification of any of the files in evidence, that the hard drive files were downloaded after the claims period, and that no one listened to or verified the hard drive files in the manner plaintiffs have undertaken in *Charter*.

A retrial, essentially, Your Honor, would require plaintiffs to present their case differently, one where Cox would be able to attack plaintiffs' much-diminished evidence.

Very briefly on the second Rule 60 motion. Before concluding, I just want to touch quickly on the second motion which talks about the -- concerns the source code that we think is elemental to the MarkMonitor system that was wrongfully withheld during discovery in this case.

On the eve of a deadline to file their opposition to *Charters'* motion for spoliation sanctions in the *Charter* case based on missing -- a missing piece of the source code, they disclosed to -- plaintiffs disclosed to *Charters'* counsel that MarkMonitor had, indeed, located that source code; albeit they had found it months earlier, but they told us just a couple of

days -- told *Charters'* counsel just a couple of days before they had to file their opposition.

That missing source code, which Cox subpoenaed, also called for here, relates to how the MarkMonitor system incorporated data from Audible Magic to verify whether the allegedly infringing files contained plaintiffs' copyright works and sued. The purported accuracy of MarkMonitor system, in particular, its ability to use Audible Magic fingerprint matching technology to ensure that only legitimate allegations of infringement were made was essential to plaintiffs' direct infringement case.

With our second motion, we request that we -- that Your Honor, if so inclined to issue an indicative ruling under 62.1, if it's inclined, you grant Cox's motion for relief from the judgment or, at a minimum, that Cox's motion raises a substantial issue that warrants further consideration.

Just in summing up in two sentences, Your Honor, we respectfully request that the record before Your Honor supports the relief under Rule 60(b). We cited cases in our argument I'm not going to repeat, but the *Schultz*, the *Eversole*, the *Square Construction* cases, among others, demonstrate where there are misrepresentations and failures to produce obviously pertinent, requested discovery and the actions prevented the moving party from fully presenting its case, where it has a meritorious defense, relief is warranted.

We submit, Your Honor, that the record before the Court represents a concerted effort, not just once, not just twice, but over and over and over again, a concerted effort to withhold the existence of the 2016 project and the fact that portions of their direct infringement evidence were created years after the discovery.

Plaintiffs' responses, their representations to the Court, their presentation to the jury aligned with that effort. It was a strategy. We submit the plaintiffs crossed the line at many points in trying to sustain this facade. We submit that Rule 60 provides for relief in these circumstances and Cox respectfully submits that it is warranted here.

THE COURT: Thank you, Mr. Elkin.

MR. ELKIN: Thank you, Your Honor. I Appreciate your time.

THE COURT: I don't have any questions now. All right.

MR. OPPENHEIM: May I, Your Honor?

THE COURT: Yes, sir.

MR. OPPENHEIM: That may have been the hardest thing I've ever had to listen to in court. Like many, I have kids. They play sports, and, not surprisingly, from time to time, despite my best efforts, they lose games. And inevitably, they come to me afterwards and they say, "ah, the ref made bad calls, the other team cheated." And even though they're upset over losing, I have to sit them down and tell them, "It wasn't the ref's fault. The

other team didn't cheat. It may have been that you just didn't have a great day, you didn't have a great game plan. Or maybe, just maybe, the other team was better." And I'm sure that conversation that I've had with my kids is the same conversation that millions of parents have had with their kids, and the lessons we teach as a parent are lessons that we often fail to follow ourselves.

Here, Cox didn't lose because plaintiffs cheated or because the Court made mistakes on admitting evidence. Cox lost this case because Cox's actions in the way it treated copyright holders and copyright infringement was shameful. Cox created sham policies to try to give the appearance of abiding by the copyright laws, but when those policies and Cox's actions were exposed in the light of day, Cox's culpability was obvious. We appreciate, Your Honor, to be heard today.

Cox's motion and Mr. Elkin's presentation this morning has some fairly pointed claims of misconduct by plaintiffs, their counsel, experts, and fact witnesses. While I understand that Mr. Elkin may desperately want to escape responsibility for a billion dollar verdict against his client, that doesn't give him license to make accusations of misconduct that everybody knows who reads the record that they lack foundation.

My colleagues and I take our responsibility to this Court, to the bar, and to our reputation very seriously. The suggestion that we have lied, hid evidence, told mistruths or half truths,

or misled the Court is without basis, and, frankly, surprising from a firm like Winston & Strawn. Your Honor, I will address the first Rule 60 motion and allow my colleague, Mr. Gould, to address the second one briefly.

Cox has not come remotely close to meeting the threshold requirements necessary to justify a Rule 62.1 indicative ruling. I won't go through all of the eight elements that Cox must meet in order to succeed on its motion. The Court is aware of them and has the papers. I'd like to focus today on three of them. One is timing. The second is Cox's claim that it was prevented from fully and fairly presenting its defense; and third, that there was fraud or misconduct by clear and convincing proof.

First, on the issue of timing. So, the rule requires that Cox file its motion, both within a reasonable time -- and it can't be more than a year after entry of judgment -- and Cox bears the burden of demonstrating. And the case law generally says three to four months after becoming aware of the misconduct is too long for filing that motion. There are even some cases, like the *Consul Masonry* case, the fireproofing case, that say two-and-a-half months is too long.

Here, it's very clear that Cox sat on its motion since at least March 2021 but probably even November 2020. Cox's initial motion pointed to several pieces of information that it claims were newly discovered as a basis for its Rule 60 motion, and it points primarily to three things: One, is the 2016 Statement of

Work, which Cox had, because MarkMonitor produced it to them on March 26, 2019. They had secondly, a declaration from me in the *Charter* case that they point to on November 9th, 2020, and they had a transcript from a hearing in the *Charter* case on February 23rd, 2021. Those are the three primary things they point to in their motion. Put that in context from a timing perspective. The jury's verdict in this case was on December 19, 2019.

The Court would have been justified in entering verdict the day the jury -- excuse me, entering judgment the day the jury rendered its verdict. If the Court had done that, Cox wouldn't have even met the one-year deadline by years.

The judgment, though, was entered on January 12th, 2021. But remember, the thrust of Cox's motion is based on November 2020. So that means that Cox had the evidence that it's pointed to in its motion before Your Honor even entered the judgment.

Cox easily could have come to this Court at that time to raise the issues it is now raising. Instead, it waited until after judgment was entered and waited until after they noticed its appeal and waited and waited and waited.

In response to plaintiffs' opposition motion which points out that Cox hasn't carried its burden of showing that the motion was timely, Cox admits that it delayed filing its motion. That's its defense. It says, we delayed. Cox tries to attempt to

justify its delay by saying they were waiting for fact discovery in the *Charter* case to come to a close or at least near to a close because they didn't actually wait for it to come to a full close. But that's not legally a justification for waiting. The rule says, you can't wait. You have to file within a reasonable time, and they point to no case law and no statute that says that you meet your burden of showing that you're timely if you're waiting to see other evidence.

Secondly, even if they were waiting, they admit that they already had the evidence that they were going to rely on. And finally, they say they were waiting because they wanted discovery in the *Charter* case to come to a close, but that discovery was subject to a protective order so they wouldn't be allowed to use that discovery in this case anyway.

In the intervention motion that Cox filed in the *Charter* case, Cox explained that it intended to file its Rule 60 motion whether or not the *Charter* court allowed Cox to intervene. That means that in September of 2021 when it filed that motion, Cox already knew that it had sufficient arguments, it believed, for a Rule 60 motion. And yet, it did not file it. And then in November 2021 the *Charter* Court denied Cox's intervention motion, but Cox then waited again until December 27th, 2021.

Since Cox had already said it was going to file the Rule 60 motion whether or not the intervention motion was granted, it was surprising that Cox waited another

four-and-a-half weeks. Four and a half weeks may not seem like much delay but when you consider it in the context of its decision to hold off from November 2020 to September 2021, then the decision to hold off from September 2021 to November 2021 and then wait until December 2021, in the aggregate Cox waited over 13 months from when it claims it first had a basis for the motion to file it.

So this District Court's motto is, "Justice delayed is justice denied," and where delay is not tolerated. Cox has not and cannot carry its burden in showing that its motion is timely.

But to be clear, Your Honor, plaintiffs don't want to win this just on timeliness. Cox hasn't demonstrated that the alleged misconduct presented it from fully and fairly presenting its defense. Cox's argument in its motion gets the facts wrong and relies on cases that are totally inapposite. More importantly, Cox totally ignores the critical role of hash values and MarkMonitor's reliance on hash values during the trial.

Cox's motion argues that if it had known -- and Mr. Elkin said this this morning -- if it had known the providence of the files on the hard drive, it would have aided its objections to the admission of the hard drive or at least would have given them a fruitful area of cross-examination. Put a pin in the question of whether Cox really did know that the files on the hard drive -- where they came from. We'll come back to that in a minute. But let's talk about the admission of the hard drive.

The Court properly admitted the hard drive. At trial, MarkMonitor's witness, Sam Bahun, laid a foundation explaining that the song files contained on the hard drive had been produced in the case, that they were copies of the songs, and they corresponded to the hashes in PX11, the list of hashes contained in plaintiffs' notices to Cox.

That was a sufficient basis for the Court to admit the hard drive. We moved its admission. There was a sidebar. And at that sidebar, both Mr. Brody and Mr. Elkin objected to the admission of the hard drive. And what the Court said -- and Mr. Elkin said it, but he said it quickly and I want to focus on it for a minute -- what the Court said was, "Just the timing of when it was made doesn't make it any more or less reliable." That's the key, Your Honor, whether the files were reliable copies of what Cox's subscribers had infringed. They were, and there's no doubt about it.

Plaintiffs built their entire case around the idea of hashes and that hashes were unique identifiers, and that if you found two files that had the same hash, those files were exactly bit-for-bit perfect replicas of each other.

MarkMonitor described its process for identifying infringers, and Mr. Elkin described it, but he described it without mentioning hashes. It's hard to describe the MarkMonitor process without mentioning hashes, but he did, and he did it for a reason; because he doesn't want the Court to focus on them.

MarkMonitor would search peer-to-peer networks for infringing files, he'd download them, confirm they were infringing and then log the files in the hashes in what were in the files. MarkMonitor would then go out on the peer-to-peer networks and look for individual subscri- -- users who were distributing files with that exact same hash. MarkMonitor would connect to that user long enough to identify the user, confirm that the hash of the file that they were distributing had -- was the same, and then they would disconnect. MarkMonitor said that it never downloaded the file again, and the reason MarkMonitor -- excuse me, both Mr. Bahun and Ms. Frederiksen-Cross explained why it wasn't necessary to download the file again. They both described that because you knew that the hashes were the same, you knew it was the exact same infringing file. This was all put in front of a jury. The jury heard at length about the uniqueness of hashes, the reliance of hashes in the MarkMonitor system.

Cox claims in its brief, both its opening brief and its reply brief, that they contested the -- the concept that hashes were unique and reliable. But if you look at Cox's arguments in their briefs, they will citation to that. They can't cite to anything in the record where they say they disputed the reliability of hashes and -- and frankly they couldn't. Courts have regularly held that hash values are more unique than DNA. *U.S. versus Thomas* is an example.

Before we came in this morning, Your Honor, before we appeared this morning, Your Honor, there was a child pornography case, I think. Well, child pornography cases regularly rely on hashes to identify criminals, and prosecutors rely on hash values for convictions, *U.S. versus Larman.*

There can be no doubt that the use of hash values to confirm that files are identical is reliable. So why is this important? The entire basis for Cox's argument that it was prevented from fully and forward putting forward its defense is that the 2016 downloads were not reliable copies of the infringing files. But we know that's not true because they all had the exact same hashes, and that was the testimony.

So whether MarkMonitor had stored the infringing files on its server when it had originally downloaded them or re-downloaded them from peer-to-peer networks three years later, it doesn't matter. They are perfectly identical copies of the infringing files. And so when the Court asked the question as to whether the files were reliable, the answer is yes, they were.

So let me step back and look at the bigger picture of this for a moment. All of Cox's substantive arguments seek to call into question the evidence of direct infringement by Cox's subscribers, but none of the evidence that Cox is claiming newly discovered dispute that the direct infringement occurred. This isn't like the *Schultz* case that Cox cites where the evidence that was withheld included a Coast Guard report that fully

exonerated the defendants.

The evidence of infringing activity on Cox's network was overwhelming. We had admissions by Cox's own employees that the infringement was happening. We had admissions by Cox's users that the infringement was happening. There were millions of notices of infringement, not just from the plaintiffs but from many, many other rights holders indicating that Cox's network was ripe with infringement.

To the extent that Cox is arguing that it was prevented from putting on a defense because there's some question about the underlying direct infringement -- whether the underlying direct infringement occurred, that argument is just without any support. The overwhelming evidence shows that there was direct infringement.

The argument that Cox could not fully defend itself because it did not know that the song files had been downloaded in 2016, what Mr. Elkin just said, it's just not credible, Your Honor. They had the 2012 to '15 Statement of Works from MarkMonitor, and those Statement of Works described the notice program and set forth in detail exactly what was going to be preserved, such as the notices, the log files, the evidence packages. Those SOWs did not require the preservation of the infringing files. Cox also had the 2016 SOW that described the downloading process in 2016. And, Your Honor, I'm happy to hand up Exhibit 16 from -- is it plaintiffs' opposition, no it's from

Cox's motion, unless Your Honor already has it.

THE COURT: Present.

MR. OPPENHEIM: It's just Exhibit 16. Thank you.

This is the 2016 Statement of Work that Mr. Elkin said they didn't know what it was. Well, if you look at this in the first paragraph, Your Honor, it says on the third line that this was entered pursuant to the Master Services Agreement dated December 2011. Well, they knew that that was the same Master Service Agreement that -- under which the 2012 to '15 SOWs were entered.

So they knew this was related to the exact same Master Services Agreement. And if you look at the second paragraph it specifically says in the last sentence, "The services are being provided in anticipation of litigation."

And then if you look at the scope of work, it describes the four protocols covered by MarkMonitor P2P solutions for the project, and those are the exact same networks at issue in the case.

Respectfully, Your Honor, nobody could have looked at this and reasonably come to the conclusion that it had nothing to do with the case. Cox also had the hard drive with the files, and, Your Honor, if you look at Plaintiff's Exhibit 3 to its opposition which I'm happy to hand up as well. Sorry. This is my last one. I apologize for that. This is the e-mail that my colleague, Mr. Gould sitting at Counsel's table sent to

Ms. Golinveaux, counsel for the plaintiffs, among others. And it describes that the hard drive had been sent and he describes it, which contains copies of the infringing files. It said right up front, they were copies of infringing files, and then they had the files, and the files had the 2016 metadata. Well, let's think about that for a minute.

Cox new the case had been filed in 2018. Discovery had been promulgated in 2018. The hard drive was produced to them in 2018. What did Cox think about the fact that they had -- that the files had 2016 metadata? Cox didn't care, Your Honor, and the reason Cox didn't care is because Cox knew that it made absolutely no difference. They knew whether the files had been downloaded in 2010 or 2016, it didn't matter because they had the exact same hashes as the hashes in the notices and in the log files.

But even if you accept Cox's claim that it didn't know that the files had been downloaded in 2016, you had to expect Cox to at least ask a question about it. They had all of these materials. They had the 2016 SOW. They had the infringing files before they took a single deposition of a single witness. And yet, they did not ask a single question. And the law is clear that if you are given the opportunity to ask the question and find the evidence, that is enough of a basis to reject a Rule 60 motion.

Let me turn, Your Honor, to the last issue I want to

address today, which is the most difficult one to address, because it is outrageous: The claim that plaintiffs, plaintiffs' counsel and plaintiffs' witnesses engaged in fraud or misconduct. Cox hasn't met its burden of showing it, yet alone it's burden of showing it by clear and convincing evidence.

Plaintiffs' brief goes through each and every one of the alleged misstatements and shows why those statements were truthful. Taken at face value, Cox's motion, if you believe it, was Mr. Elkin's argument, was that plaintiffs lied, plaintiffs' counsel lied, MarkMonitor's witnesses lied and plaintiffs' experts lied. So contrary to Cox's claims, there was no massive conspiracy or cover up. The statement by plaintiffs' counsel and the witnesses were truthful and accurate. I'm happy to go through each of the alleged eight alleged acts of misconduct separately, but let me just hit a few, and I'm happy to answer your questions on any others.

Accusation 3. Let's start there. Plaintiffs withheld the 2016 SOW despite a court order. First and foremost, they had the SOW, Your Honor, and they can't deny that. They not only had it they admitted they saw it. That's what Mr. Elkin said today.

The claim that it was buried -- in their briefs they actually claimed it was buried in irrelevant documents. That is hogwash. It was one of 33 documents in the production. Now, sometimes there can be really big documents. These weren't -- those 33 documents were 240 pages, and we know that Cox reviewed

that production because they used other documents from that production in depositions. You know what they haven't done? They haven't put forward a declaration in this case to Your Honor to say, we didn't see it, now we hear that they couldn't, or we didn't know what it was, and they haven't explained why they didn't ask any questions about it.

Cox complains that it was misconduct that plaintiffs hadn't produced it. It is true that plaintiffs didn't produce it, but this was not an agreement with the plaintiffs. As Your Honor can see looking at it, it was an agreement between the RIAA and MarkMonitor.

Cox complains that plaintiffs were ordered to produce it. That's not true. Plaintiffs were ordered to produce agreements between plaintiffs and MarkMonitor relating to the program at issue. And I was listening to Mr. Elkin's presentation and one of the things he said, quote, "Judge Anderson ordered plaintiffs to produce all of their written obligations to MarkMonitor." Well, that's not true, Your Honor. That's a misstatement. Judge Anderson's order limited to the program at issue and limited it to the plaintiffs. Plaintiffs fully complied not only with the letter of Judge Anderson's ruling but the spirit of it. But even if there was a question, it certainly doesn't demonstrate misconduct by clear and convincing evidence. Again, Cox had the SOW. Based on *Tunnell versus Ford Motor Company*, Your Honor, if Cox had the information, it could have pursued it

in discovery, and that's a basis to deny the Rule 60 motion.

Accusation number 4, Your Honor, plaintiffs concealed the significance of the 2016 SOW and on this Cox points to a statement by Mr. Bahun, quote, "The RIAA MarkMonitor did not enter into a separate SOW concerning any litigation program." Well, that is, in fact, a statement in Mr. Bahun's declaration. It fully takes out of context what Mr. Bahun was talking about in the preceding sentences. The declaration was talking about the 2012 SOW that has a reference in it to a quote, "Corporate P2P litigation program," and that reference says that "if the RIAA intends to pursue that, it will need to do so under a separate SOW," and Mr. Bahun was explaining there was no separate SOW for that litigation program.

Even if one were to think that Mr. Bahun's statement was vague or ambiguous, which I don't believe it even comes remotely close to that, Your Honor, because in context it's very clear, it certainly does not demonstrate that he was engaged in fraud and misleading by clear and convincing evidence.

Accusation number 5, Your Honor, that plaintiffs misrepresented that there was no effort to validate the data in the MarkMonitor 236 spreadsheet, and Mr. Elkin referred to this in his argument as well and to the statement that I made at sidebar to the Court. This is simply not true, and the answer was -- that I gave, was and is correct. The 236 spreadsheet was never an effort to validate data, and Cox has no support for

that. Cox goes on to say, well the use -- excuse me, "The requirement of MarkMonitor to run the files in 2016 through Audible Magic was obviously yet another effort to validate the data, and they -- we had an obligation to put that forward." The -- the language in Cox's brief is that it -- the SOW required MarkMonitor and Audible Magic to, quote, "reverify the downloads to ensure they contain copies of plaintiffs' copyrighted works." This is the kind of advocacy that undermines Cox's credibility.

If you look at Exhibit 16, there's nothing in SOW that says anything about reverifying. Nothing that talks about ensuring. What it says is that the process would -- "The files would be processed against Audible Magic for identification and verification." It does not say why that was done, and Cox's effort to suggest why it was done has no credibility.

Now, Your Honor, the reason it was done is work product, and I am happy on a sidebar in camera to explain it to Your Honor so it is not a waived issue, but there is no credibility to the suggestion that the reason it was put through -- the files were put through Audible Magic was because there was an effort to reverify them.

In Cox's brief on page 16, it says the reason that MarkMonitor was contracted to do an Audible Magic look up, and it then contains a quote about verification. I look at this over and over again. There's -- there's no cite in the quote and that quote doesn't exist anywhere. Never -- nobody, ever, ever, ever

has said that 2016 Audible Magic look ups were done for purposes of verification. They took words out of another quote from another person somewhere without citing it, put them together and decided that was a legitimate way to brief the issue. It's not.

Accusations 1 and 2, that the plaintiffs caused -- one, that the plaintiffs caused MarkMonitor witness and an expert to give testimony that mischaracterized the hard drive's contents, and two, that the plaintiffs submitted a declaration and made arguments that mischaracterized the hard drive. These both go to the same issue. The statements by the witnesses were accurate and truthful as set forth in our opposition. I don't need to go through them word-for-word. They stated that the files were copies of the infringing recordings, and we already established at trial in 2019, if they had the same hash, they were bit for bit perfect copies. But the gist of the acquisition is that Cox only learned from discovery in the *Charter* case that the files on the hard drive were from 2016.

The argument Cox is putting forward is that it wasn't until the *Charter* case that they realized that, but we already went through. They had the 2012 through '15 SOWs which described what would be preserved in what pot. They had the 2016 SOW, they had the files with the metadata, and they knew that the case had been filed in 2018, and they knew that the metadata was from 2016. Cox absolutely should have known and frankly they probably did know that the files had been downloaded in 2016. Your Honor,

before I turn over to my colleague Mr. Gould who will address the discovery piece of the first one as well because they're the same.

THE COURT: Okay.

MR. OPPENHEIM: Cox's Rule 60 motion lacks any merit. The reason that we are here is not because plaintiffs or their counsel or their witnesses said or did anything wrong, we're here because a jury held Cox responsible to the tune of a billion dollars for its completely outrageous behavior. We're here because counsel for Cox decided to try this case in a manner that obviously didn't work, and they desperately want a do-over thinking that that might change the outcome, but the jury didn't render a billion dollar verdict because the plaintiffs misled them on the providence of the recordings. The jury rendered a billion dollar verdict against Cox because Cox was an obvious, massive, willful infringer, and nothing Cox has said in its motions changed that fact.

THE COURT: Thank you. All right. Mr. Gould.

MR. GOULD: Good morning, Your Honor. May it please the Court. Nice to be back in your courtroom, sir. I want to address largely the second Rule 60 motion, but there's an overlay with the first and that, as a sort of soft ball at the end, *Charter* asked -- excuse me -- Cox asked for some unspecified discovery in connection with the first motion. So, the second Rule 60 motion should be denied outright for multiple reasons.

First, Cox concedes it cannot meet the Rule 60 elements. That should be the end of the matter. This is really just a motion to compel discovery. But nothing in Rule 60 authorizes postjudgment discovery, and even if it did, Cox's appeal divested this Court of jurisdiction to alter status of the case and the record pending on appeal.

As to the first point, they filed this motion on the eve, I think the day -- the night before the one-year deadline. Rule 60 has a very rigid one-year deadline for 60(b) motions. Cox concedes in its papers that it can't establish those elements, specifically to show that the new evidence would likely change the outcome. If you read its papers closely, it argues that it's spec- -- if its speculation pans out, it might warrant relief in the future, and the opening memo at page 1 says, "New information may warrant further relief." There's similar references throughout their two papers. By any measure they failed to satisfy the hide burden of Rule 60 and yet, oddly at page 9 of their reply brief in ECF 768 they criticize plaintiffs for, quote, "wrongly focusing on the merits of Cox's anticipated Rule 60(b)2 motion," end quote.

It's not an anticipation -- anticipated motion. ECF 748 clearly states in bold, capital letters, "motion for relief from judgment under rules 60(b)2 and 60(b)3 and requests for indicative relief -- excuse me, indicative ruling under rule 62.1." Respectfully, we think this one's a bit easy. They filed

a motion seeking extraordinary relief, they can't satisfy the burden. The motion should be denied.

Recognizing this, Cox asks the Court to instead consider its motion a placeholder, hold that motion in abeyance, authorize the discovery, fishing expedition based on speculation and hope, and permit Cox to re-file an amended Rule 60 motion, while outside 60(b)'s one-year time bar. At heart, Your Honor, this is a Rule 37 motion to compel three years after the close of discovery, and our request to toll or relieve it from Rule 60's one-year time bar.

The Court should deny this, too. There's no discovery provision in Rule 60. Cox cites no case anywhere in the 4th Circuit, not the 4th Circuit or any District Court within the Circuit that has granted or endorsed the idea of Rule 60 discovery. The mandate is with the 4th Circuit and this Court lacks jurisdiction to alter that record on appeal. And they offer no basis to toll this Rule 60 deadline in any event.

Now, in its papers Cox sort of indistinctly conflates two issues. One is the right to Rule 60 discovery generally, and one is the Court's authority to order discovery given that the mandate is now with the 4th Circuit.

Under both scenarios, the result is the same, but it's important to address both of them and so -- so I will. I'll talk first briefly, Your Honor, about divestiture. It's -- it's fairly black letter law that filing of appeal divests the

District Court of jurisdiction over most aspects of the case. We cite numerous 4th Circuit and Supreme Court cases at our brief, and with good reason. As the 4th Circuit explained in *Doe versus Public Citizen*, quote, "A district court does not act in aid of an appeal when it alters the status of the case, as it rests before the Court of Appeals," end quote. So, to use a more technical term, Your Honor, it basically mucks up the appeal. It creates a confused record with a moving target, and Cox again cites nothing in the 4th Circuit endorsing anything otherwise or any discovery while the case is on appeal and overwhelmingly courts find that discovery on these -- in this posture is unwarranted and inappropriate.

See with the rules, Your Honor, the only basis that I'm aware of is a motion to compel under Rule 37, and what Rule 37(b) says is that "such a motion must be made in the court where the action is pending." Well this case is closed, retains limited jurisdiction to entertain certain types of ancillary issues and certainly to enter a 62.1 indicative ruling, but not to entertain a 37 motion to compel. And if you look at Rule 62.1(c), even in the event of an indicative ruling, if you look at 62.1(c), it says, upon remand, excuse me, it says, "The District Court may decide the motion if the Court of Appeals remands for that purpose," and now the motion there clearly refers to a Rule 60 motion and remand for that purpose clearly refers to entering an order under Rule 60.

Now, even absent an appeal and divestiture nothing in Rule 60 authorizes discovery, and the only case within the 4th Circuit that either party has identified that addresses this issue at all is a Maryland -- a district Maryland 2016 case called *United States versus Higgs*, and what that court found was -- this was a Rule 60(b) motion for fraud on the court. Rule 60(b) has no discovery provision, and the Court has found none from this circuit to support his request for such discovery. 60(b)2 and 60(b)3 of course are the -- are the same.

Now, admittedly outside of the 4th Circuit a few courts have granted Rule 60 discovery, but it's heavily disfavored and it's exceedingly rare. And that makes sense where parties have had a full and fair opportunity to litigate their case and respecting the finality of judgments.

Cox cites a few outlier case from out of circuit, but none change the results here, and I want to address them briefly because I think this is-

THE COURT: No, I don't need you to do that.

MR. GOULD: Thank you, Your Honor.

I -- I don't think I need to get to the merits too deep on the second motion, but I want to touch on one point. So, the basis -- and I'll remind the Court that Cox's claim for this new found source code that purports to relate to the file verification step in MarkMonitor's process, and I know you read the papers you referred already to getting in the weeds here so

I'll stay at a high level.

At a high level MarkMonitor sends a file -- a fingerprint of a file to Audible Magic, Audible Magic does a matching algorithm, generates a response and sends it to MarkMonitor. Now, on page 1 of Cox's second Rule 60 motion, Cox describes the code as relating to how MarkMonitor system, quote, "incorporated data from Audible Magic to verify whether an alleged infringing file contains plaintiffs' copyrighted work."

Now it's worth pausing briefly on that because it's not actually Audible Magic's code that's doing the matching that is newly disclosed. Audible Magic produced this code and Cox's experts inspected it. So according to Cox, this is MarkMonitor's ancillary code that receives -- receives and adjusts Audible's responses. Now, Cox argues in its reply that we somehow put the code and its function at issue by talking about it in the brief but ignores the fact that we adop- -- used and adopted their own characterization of it, so we took that at face value and argued the point.

Now, I really want to focus on two substantive points briefly. One is -- you know a lot of these factors start to blend a little bit exceptional circumstances, was it material, is it cumulative, would it change the outcome, were they prevented from fully and fairly? I'm not going to go through each of those, but I want to mention a couple of points that I think check quite a few of those boxes in a totality type of regime.

First, and this is new, Your Honor, it's not in the papers, and I think it's really important context. You're aware that the *Charter* and *Brighthouse* cases are ongoing. Marching towards trial, and you're aware that Mr. Elkin and Ms. Golinveaux and Ms. Anderson -- Mr. Anderson and their colleagues at Winston represent those parties. That's why we're all here today. They've had access to all this information in all these other cases.

What's happening here demonstrates this is purely an opportunistic move, Your Honor. It's not really a concern about something material that would change the outcome here, and let me explain to you why. They've taken the exact opposite position in those cases with respect to this new -- this new disclosed code. Mr. Elkin argues here that *Charter* code disclosed two years after the trial is so essential that Cox was denied a fair trial, and he speculates that the existence of this code would change the outcome of this case.

Now, in the *Brighthouse* and *Charter* case, the same code came to light after discovery but seven and nine months before trial; two years after trial, seven and nine months before trial.

Now, MarkMonitor immediately offered to make that code available for *Charter* and *Brighthouse's* expert's inspection. And not only did Mr. Elkin's clients refuse to review the code, but Mr. Elkin and Ms. Golinveaux signed a Rule 37 motion sanctions motion against plaintiffs and MarkMonitor to preclude any use or

reference to this newly disclosed code at any motion, at any hearing, or any trial. They've argued that inserting into the record in those cases seven and nine months before trial, this new code would be so unduly prejudicial, so disruptive to the case record that the only fair outcome is total preclusion, and they offer to throw in some other sanctions on our backs in the mix. "It's too late," they told the courts.

There is no way, Your Honor, to reconcile those two positions from pleadings signed by Mr. Elkin. The same code found nine months before trial must be excluded on fairness grounds and never inspected by anyone, but here the very same code whose absence Cox ignored during discovery and trial, as we set forth in our papers, found two years after trial is so essential, so material, that it requires overturning a verdict and a judgment.

I'm going to skip some of these things that I have a sense you're well aware of. So -- another point too, to the extent there's any -- okay, I'm -- claim that plaintiffs are somehow -- need to be held accountable for MarkMonitor -- strike that. Let me pause for a moment, Your Honor. The second part of Cox's rule, second Rule 60 motion is a B-3 request based again on fraud or misrepresentation and it's even more speculative and flawed.

Now for this Cox must prove misconduct by a party, by clear and convincing evidence. Now they don't allege any misconduct by a party let alone by clear and convincing they say

nonparty MarkMonitor didn't produce some code that they think it should have. It hasn't showed any misconduct or violation by MarkMonitor. Now the records show that during the case MarkMonitor produced the code that identified and believed was responsive. The parties disagree about whether it was responsive to the subpoena and Cox in the first place. I'm happy to talk about that, Your Honor, I just encourage you to take a close look at the two different pieces --

THE COURT: Yeah, I need to --

MR. GOULD: Thank you. More importantly, this has nothing to do with the plaintiffs. When plaintiffs learned of this new code in the *Charter* case, you know what they did, Your Honor? Immediately, the day they learned they told the other side. Didn't wait to figure out what happened, why, where was it going, what else was found. Immediately, the day of, within hours there's a declaration in the record signed by me attesting to when plaintiffs learned and when we disclosed. This notion of misconduct again is farfetched and now they try -- they speculate and ask for discovery to explore the extent to which we were -- plaintiffs were responsible for the nondisclosure and the late disclosure. There's no -- there's no there, there.

They knew we had no control over the source code. They sought it from us in the first place, we objected because we lacked possession and control. They understood that and they served a subpoena on MarkMonitor, they moved to compel

MarkMonitor. Plaintiffs didn't appear in that ancillary -- that miscellaneous subpoena case in California.

Now they say we have a contract, plaintiffs have a contract with MarkMonitor as a consultant to cooperate. True. But if you look at that and an exhibit to the papers, it's 739-9 on ECF. It's a consulting agreement that obligates MarkMonitor to produce some data, affidavits if needed, and court and deposition appearances. It doesn't say anything about obligating us -- obligation them to produce their proprietary secret sauce and source code, and the contract that sets forth the relationship in the first instance, this is the master agreement between the parties which is PX3 in the trial record, isn't in these papers, sets very clearly that MarkMonitor at all times retains all right, control, access, everything over its source code. The idea that we somehow engineered this is -- is farfetched.

Lastly, finality. Even if Cox satisfies its elements, the Court still must balance the policy of favoring finality. Here there's no misconduct, certainly by clear and convincing evidence. This last ditch hail Mary by a losing party as the clock runs out should be denied.

Now, I want to talk just briefly about the specific discovery sought, and here I'll talk about the two motions.

THE COURT: No, I don't need to hear. I don't want to hear about the specific discovery.

MR. GOULD: Thank you, Your Honor. If you have any questions I'm happy to answer them.

THE COURT: I don't. Thank you. All right. Mr. Elkin, brief reply.

MR. ELKIN: Thank you, Your Honor, I'll just be brief I'm not going to touch on all the points that I think were adequately covered by the papers. I do want to mention several -- first having to do with the timing, why did we wait until the time that we waited?

The November 2020 declaration from Mr. Oppenheim, first of all is reacted, and secondly, did not contain the serious disclosures that did not occur until the spring of 2021. We were just about headed into fact and expert discovery with these issues were going to be fully fleshed out, and we didn't have an opportunity to really go into them, and we wanted to make just one Rule 60 motion if we were going to make it. And so that was a decision we wanted to have the most robust record we possibly could, and clearly, we would have had to have sought relief -- Cox would have had to have sought relief under the protective order in the *Charter* case. An effort was made to -- to do that, it was not granted, and we repositioned our motion as quickly as we possibly could. That is our good faith and good reason for why we did what we did.

With regard to the hash values, the issue is -- first of all, I haven't taken issue with the notion of hash values in this

argument, and I haven't taken issue with them in our motion papers. The issue for us, first of all, is that's not the case they presented. They specifically presented a case with this hash technology but predicated on the MarkMonitor spreadsheet and the -- and the audio files. That was the case they presented. That's the case Your Honor heard. It's the case the jury heard, it's the case that was presented to us. And nowhere in Mr. Oppenheim's argument did he specifically reference the notion that the -- that the hashes themselves at some point have to be tethered to the audio files. And that does not exist in the record. I suspect that one could actually just match hash numbers and hash numbers, but that's not the case they presented, and the case would have been certainly subject to far more rigorous review, especially given the burden that they have with regard to establishing what they are and how they are.

Mr. Oppenheim's reference to the testimony of Mr. Bahun in terms of the metadata on the 2016 hard drive conflated the questions that we put to the witness with regard to the date of the audio files with the date of the hard drive, so that's really of no moment. And they -- with regard to the preservation of the evidence under the 2016 Statement of Work, first of all the 2000- -- the fact that there's a 2011 master agreement, there are so many different Statements of Work that had nothing to do with this case. The mere fact that there was a reference to -- and a preamble about May 2008 was of no particular moment, but,

frankly, even if it was, would it be -- the issue is not whether we could have asked a question, we should have asked a question in a deposition about what are these audio files or tell us about this agreement. The issue is -- is the misconduct that we have tried to present to the Court, not whether or not we could have been clever to have asked one question or the other question or somehow we should have caught their practice in some way, shape, form, or otherwise. And the notion -- the only agreement with regard to all of the agreements that the plaintiffs entered into with MarkMonitor that they produced, they're all with the RIAA, they're not with the individual plaintiffs. The only agreement that wasn't with the RIAA was the 2018 agreement between Oppenheim and Zebrak and MarkMonitor. That was the so-called, you know, work product special servicing that they -- that they did for them.

In terms of the misconduct, the -- Bahun's declaration --

THE COURT REPORTER: I'm sorry?

MR. ELKIN: Yes. Bahun's declaration, B-A-H-U-N, his declaration of MarkMonitor that somehow the notice program of 2012 to 2015, that was, you know -- that somehow the 2016 Statement of Work didn't relate to the 2012 and 2015 notice program just really can't be reconciled. The reason why they did the 2016 project as we now know, was to create, recreate the files in the record with respect to that notice program, so the fact that he could make the sworn statement to the contrary, I

think is worth noting.

And there was a statement that was made in Counsel's argument with regard to the fact that if -- that we should have known that the files were downloaded in 2016. I can assure you that if we knew that the audio files were downloaded in 2016, we certainly would have argued that to Your Honor. We would have made a big deal about that to the jury. We would have asked Your Honor to revisit some of the other rulings --

THE COURT: Well, isn't the question whether you had it or not and could have looked at it and chose not to look at it versus what you would have done had you known?

MR. ELKIN: Well, there's nothing in the indication -- Your Honor, there's nothing in the audio files themselves that indicated when they were sourced. That information was in the PCAPs. They did not produce the PCAPs. They produced the audio files pursuant to the 2016 project, but they did not give us the correlative evidence that would have given us the ability to know that. We tried to find that information. We -- initial- -- we were suspicious, we wanted to find that information. We asked whether the significance of the 2016 metadata on the hard drive, and Your Honor asked us to probe further, which we did, and Mr. Bahun lied in his testimony. So yes, if we would have -- if the evidence would have been there, of course we should have, but it wasn't there, Your Honor. It just wasn't.

I -- the a -- so I -- I just -- and -- and at the end of

the day, with regard to the statements, they did all they could to camouflage. They made statements from the very beginning of the case through the end of the trial, gavel-to-gavel that the audio files that MarkMonitor went and captured occurred prior to the notice program some time in the 2000s, and then on the basis of that they had those files verified by Audible Magic and they -- MarkMonitor then went to scour the Internet downloading these peer-to-peer protocols on ISP networks to be able to notice subscribers. That was their linear progression of evidence. They didn't say, oh by the way the audio files really didn't occur during the period of time we said, it occurred, you know, many years after we sent the notices. They didn't say that, so we had no basis to understand that that was the case.

So the last thing I want to mention is with regard to this source code. We think it is elemental to this case given the fact that the verifications that they claim occurred had nothing to do with the audio files in evidence at all. Audible Magic's source code is -- is not the issue. The issue was the extent to which MarkMonitor's system interacted with Audible Magic and that would be lodged with the MarkMonitor source code itself. I'm not going to get into some of the reasons why various correspondence that's not before the record exist, except for to say that at the time the source code was actually produced, all of the expert depositions in the case had been conducted. All of the fact witness testimony had been conducted. The motions for summary

judgment had all but been briefed, and it's a completely different context in which to be able to evaluate whatever statements that Mr. Gould described to counsel in that case.

The last point I want to make Your Honor before resting, unless Your Honor has any questions, is whether about this is a case of being a sore loser, and whether this was a situation where Cox had acted badly and somehow we're trying to get a second bite at the apple. This is not about Cox's conduct, and this is not about at the end of the day being concerned about whether a particular strategy worked or it didn't work. The issue with that is whether or not the plaintiffs' conduct had a deleterious effect on our ability to be able to present our case. A cornerstone of this trial was all about the direct infringements. We spent a lot of time, as Your Honor remembers, I'm sure, going over the bonafides of the MarkMonitor system, the technology, the infringing files. We heard recordings from start to finish. The issue, I would respectfully urge the Court to consider in deliberating over this motion, is whether or not their misrepresentations, the plaintiffs' misrepresentations and misconduct affected our ability to raise material points that we think are consistent with our rights to be able to have adjudicated in your courtroom.

THE COURT: All right. All right. Thank you, Mr. Elkin.

MR. ELKIN: Thank you, Your Honor.

THE COURT: Thank you, counsel. We'll take it under

consideration. I appreciate you coming in and the arguments that you've made and the pleadings have been very professionally done. I remember the case well. I have a case in limine and *Daubert* motions this afternoon with 31, and it pails in comparison to the litigation that you all undertook. You looked very closely at all the issues, and it was obviously an interesting case from a legal standpoint and very well handled at the trial level and now at this level. So I appreciate that, and we'll get you out a decision shortly. All right. Have a good weekend. We're in recess.

(Proceedings adjourned at 11:59 a.m.)

C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Scott L. Wallace — 3/22/22

Scott L. Wallace, RDR, CRR
Official Court Reporter

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